Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Qwest Communications	)	
International, Inc., for Authorization to	)	WC Docket No. 02-189
Provide In-Region, InterLATA Services	)	
In the States of Montana, Utah,	)	
Washington, and Wyoming	)	

COMMENTS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Service Inc. ("McLeodUSA") submits these Comments on the Application by Qwest Communications International, Inc. ("Qwest") to provide in-region, interLATA services in Montana, Utah, Washington, and Wyoming: ("Application").

Grant of Qwest's Application in this Case is Not in the Public Interest

A. Background

McLeodUSA and Qwest have amended their interconnection agreements in each state subject to this Application to provide that:

> "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under the escalation process to be established between the parties."

In light of recent disputes with Qwest, it has become apparent to McLeodUSA that Qwest is not currently committed to the application of this provision. This fact, coupled with Qwest's failure to comply with certain agreements between the parties, should be considered in the

Commission's determination of whether the public interest standard contained in Section 271 has been met.

As has been disclosed in various regulatory proceedings, McLeodUSA is also a party to an oral agreement with Qwest, in which McLeodUSA agreed to remain neutral on (neither support nor oppose) Qwest's 271 applications as long as Qwest was in compliance with all our agreements and with all applicable statutes and regulations. Qwest is currently not in compliance with the agreements between the parties, and McLeodUSA has had no indication from Qwest that it intends to comply with those agreements.

B. The Public Interest Standard

Although the Commission has declined to specify exact factors that will be considered in determining whether an applicant complies with the public interest requirements of Section 271 (d)(3)(C), it is clear that this standard requires a determination by the Commission that is separate from those required by Sections 271 (d)(3)(A) and (B). Most recently, the Commission has stated that:

> Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity. At the same time, section 271(d)(4) of the Act states that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected. [footnotes omitted]

Application of Verizon New Jersey, Inc., WC Docket No. 02-67, FCC 02-189, slip op. ¶ 166 (June 24, 2002). Thus, the essence of the public interest inquiry under Section 271(d)(3)(C) is to let the Commission consider "other relevant factors" that might exist which would undermine the congressional intent that markets be open. As will be shown below, the instant case presents just such a situation.

C. The Public Interest Requires that Qwest's Application be Denied.

The Commission is aware, as a result of its proceedings in WC Docket No. 02-89, of the existence of certain agreements between Qwest and certain CLECs, including McLeodUSA. The issue in that proceeding, which was instituted as a result of Qwest's Petition for a Declaratory Ruling, is whether certain agreements between Qwest and CLECs were subject to the filing provisions of Section 252(a). It is important to understand, however, that the public interest issue raised by McLeodUSA in this case is unrelated to the resolution of WC 02-89. McLeodUSA's position is that Qwest should be required to perform on its agreements with other carriers, regardless of whether those agreements did or did not need to be filed and approved under Section 252. Qwest's failure to perform, particularly given the facts in the instant case (where Qwest has steadfastly maintained that the agreements did not need to be filed), mandates a finding that the grant of Qwest's 271 application in this case is contrary to the public interest.

There are two major categories of agreements upon which Qwest has failed to perform. First, under an approved amendment to the interconnection agreements between Qwest and McLeodUSA in various states, McLeodUSA purchases a "customized" UNE-P product (designated by McLeodUSA as "UNE-M"). The interconnection agreement

amendments contain rates for the UNE-M product. Qwest, however, does not correctly bill these rates, but bills McLeodUSA rates in excess of the rates contained in the interconnection agreement amendments. Both Qwest and McLeodUSA understood at the time the amendments were signed that this would be the case, at least for some period of time; and Qwest therefore followed a process of making payments to McLeodUSA such that the net amount paid by McLeodUSA conformed to the amendments.[1]

In early 2002, however, Qwest ceased making these payments. The result of this cessation was that McLeodUSA paid to Qwest an amount for the UNE-M product that was in excess of the amount specified in the interconnection agreements between the parties. Within the last few days, Qwest has made payment for these past periods. Although the result of these payments is that McLeodUSA has now been charged the correct amount (net) under the interconnection agreement, Qwest's commitment to honoring the terms of the amendment is now in question.

The second category of agreements involves Qwest's commitment to make payments to McLeodUSA pursuant to a Purchase Agreement in an amount equal to a certain percentage of McLeodUSA's purchases from Qwest.[2] Although Qwest performed under this agreement from the end of 2000 until the fourth quarter of 2001, it now is refusing to honor its commitment to McLeodUSA. McLeodUSA has had no indication from Qwest that it will voluntarily honor its commitment in the future.

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[1] The mechanics of this process are described in the affidavit of Lori Deutmeyer, filed by the Minnesota Department of Commerce in an ex parte filing in WC Docket No. 02-89 on July 2, 2002.

[2] This agreement is detailed in the affidavit of Blake Fisher, filed by the Minnesota Department of Commerce in an ex parte filing in WC Docket No. 02-89 on July 2, 2002.

The nonperformance of these agreements, Qwest's refusal to honor its commitment to "business to business" issue resolution, and its desire for McLeodUSA's neutrality in Qwest proceedings related to interLATA entry, evidences a pattern of behavior that could "frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected." This is squarely within the scope of conduct proscribed under Section 271(d)(3)(C), as interpreted by the Commission in the 271 order for Verizon New Jersey. This conduct is especially egregious when it occurs at the final stages of Qwest's years-long state level proceedings related to Section 271. The facts show that Qwest performed under these agreements until it was effectively too late for McLeodUSA to assert its rights in a manner that could be meaningfully considered in the context of Section 271. It is clearly not in the public interest to allow conduct such as this, and the Commission should rely upon that conduct to deny Qwest's application for failure to meet the requirements of Section 271(d)(3)(C).

Respectfully Submitted,

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